



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Cook Construction Company, Inc.

**File:** B-248970.2

**Date:** March 5, 1993

Dennis E. Jontz, Esq., Civerolo, Wolf, Gralow & Hill, for the protester.  
Rafael Valenzuela, Jr., for Valco Construction Company, Inc., an interested party.  
Major Bobby G. Henry, Jr., and Captain Gerald P. Kohns, Department of the Army, for the agency.  
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Agency properly rejected bid as nonresponsive where bid's descriptive literature demonstrated its offered product's noncompliance with an invitation for bid specification requirement.

### DECISION

Cook Construction Company, Inc. protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DABT63-92-B-0008, issued by the Department of the Army, Fort Huachuca, Arizona, to rebuild a sewer system. Cook contends that its bid was improperly rejected because of the Army's unreasonable and overly restrictive interpretation of the IFB specifications.

We deny the protest in part and dismiss it in part.

On April 30, 1992, the Army issued the IFB for the repair/reconstruction of the existing sewer system under the Fort Huachuca Pershing Plaza housing area "by means of proven trenchless technologies." The specifications incorporated by reference several national standards published by the American Society for Testing and Materials (ASTM),<sup>1</sup> and

<sup>1</sup>The publications of concern here are: (1) ASTM D-638, Test Method for Tensile Properties of Plastics (1989); (2) ASTM D-790, Standard Test Methods for Flexural Properties of Unreinforced and Reinforced Plastics and Electrical

(continued...)

warned that "[i]f there is any conflict between these standards and this specification, this specification shall govern." The specification's structural requirements required that the replacement pipe have a flexural modulus<sup>1</sup> of 225,000 pounds per square inch (psi) as tested under ASTM D-790. The IFB also required that "[a]ny PE [polyethylene] or HDPE [high density polyethylene] system proposed must meet all strength and performance requirements." [Emphasis in original.]

The IFB required bidders to furnish descriptive literature and submittals<sup>2</sup> with their bids showing the offered product's conformance to the IFB requirements. The IFB warned that failure to make the required showing would result in rejection of the bid as nonresponsive. See Federal Acquisition Regulation (FAR) § 52.214-21, which was included in the IFB.

On May 18 (prior to bid opening), Cook wrote the agency seeking, among other things: (1) verification that both the Insituform system--a "cured-in-place" system that was ultimately offered by the awardee in its bid--and the U-Liner system--the HDPE system that Cook ultimately offered in its bid--were approved replacement pipe systems under the IFB specifications, and requesting the identities of any other approved systems, and (2) the elimination/revision of the portion of the specifications that included the 225,000 psi, ASTM D-790, flexural modulus requirement because, as written, it only allowed the Insituform system and "would amount to a sole source government purchase."

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<sup>1</sup>(...continued)

Insulation Materials (1986); (3) ASTM D-3350, Polyethylene Plastics Pipe and Fittings Material (1984); and (4) ASTM F-1216, Standard Practice for Rehabilitation of Existing Pipelines and Conduits by the Inversion and Curing of a Resin-Impregnated Tube (1989).

<sup>2</sup>Flexural modulus is a measure of a pipe's ability to withstand external crushing forces.

<sup>3</sup>Paragraph 2 of IFB specification section C-9 (trenchless reconstruction performance) states:

"All proposed materials and methods of construction shall be submitted for approval . . . Submittals are required as bid enclosures. Bids received without enclosures will be considered non-responsive. Third party test results are required to show that the final product will meet the following specified requirements."

On May 27, the Army replied to Cook's inquiry by (1) refusing to comment on which replacement pipe systems the Army considered to be "approved" because it was the bidder's responsibility "to locate source/firm needed for performance of this job," and (2) refusing to amend the specifications because:

"This is what [the] requiring activity wants. Any material and methods of reconstruction [that meet] these criteria [are] acceptable. That is why this [IFB] requires enclosure of 'descriptive [literature]' to tell us what kind of material and method [are] to be used for this reconstruction."

Notwithstanding the Army's reply, Cook submitted a bid based on the "U-Liner" system. The descriptive literature submitted with Cook's bid identified Pipe Liners, Inc. as its supplier of the U-Liner system, and included a Pipe Liners, Inc., brochure entitled "GUIDELINES AND GENERAL SPECIFICATIONS for U-Liner™ Pipe Gravity Pipelines." The brochure listed the typical physical properties of a compression molded specimen of pipe as including a flexural modulus of 136,000 psi when tested using the ASTM D-790 method.

On June 1, the Army opened five bids. Two bids were rejected immediately.<sup>4</sup> The three remaining bids included Cook's low bid of \$1,332,495 and Valco Construction Company, Inc.'s high bid of \$2,312,128. On August 14, the agency completed its technical evaluation of the bids, finding Cook's low bid and the second low bid nonresponsive because their respective descriptive literature submissions did not demonstrate the conformance of their proposed products to the specifications. Cook's descriptive literature did not show: (1) the required 225,000 psi flexural modulus (it showed 136,000 psi instead); (2) that its replacement pipe would form the required "mechanical lock" with the existing "host" pipe; and (3) that its replacement pipe would expand sequentially against the "host" pipe as required. On November 19, the Army rejected Cook's bid and the second low bid as nonresponsive, and awarded the contract to Valco--which proposed

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<sup>4</sup>The Army rejected one bid for lack of a bid bond and one for failing to submit descriptive literature.

the Insituform system.<sup>5</sup> This protest followed on November 27.

Any bid that does not conform to applicable specifications must be rejected. FAR § 14.404-2(b). A responsive bid represents an unequivocal offer to provide the exact thing called for in the IFB. See Kincaid Equip. Mfg., B-246079, Feb. 3, 1992, 92-1 CPD ¶ 140. Where, as here, descriptive literature is required to establish conformance with the specifications, and bidders are cautioned that nonconformance will cause the bid's rejection, the bid must be rejected as nonresponsive if the literature submitted fails to show clearly that the offered product complies with the specifications. Lynch Machinery Co., Inc., B-228689, Sept. 24, 1987, 87-2 CPD ¶ 297.

Here, Cook does not dispute that its pipe does not meet the 225,000 psi stated minimum strength requirement; its descriptive literature states a 136,000 psi strength capability when tested in accordance with the ASTM D-970 method.<sup>6</sup> Instead, in its protest, Cook offers two different theories for finding that the IFB's minimum strength requirement does not apply to its offered product.

In Cook's initial protest, it argued that the IFB used language that invited bids using polyethylene piping and therefore the inclusion of "language in the [IFB] that requires physical properties that exceed the properties of any known polyethylene [pipe]" must have been inadvertent. Cook specifically identifies the flexural modulus of 225,000 psi as "the exclusionary requirement." Based on this premise, Cook argued that "the specification . . . should not have been in the solicitation to begin with" because the requirement restricts competition, is unnecessary--because the piping is to be installed at a relatively shallow depth that requires at most a flexural modulus of 125,000 psi--and is inconsistent with other specification

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<sup>5</sup>While Cook questions the delay in rejecting its bid, the Army reports that the delay in award was occasioned by funding problems. The agency planned on using fiscal year 1992 funds for this procurement; however, it withdrew the funding in mid-July because of its understanding that the resolution of a protest by the second low bidder could take until October--i.e., past the September 30 expiration date of the 1992 funds. New funding did not become available until November.

<sup>6</sup>Since we find that the 225,000 psi requirement was mandatory and applicable to the product that Cook offered, we need not decide whether the U-Liner system meets the mechanical lock and sequential expansion requirement.

language that references and therefore encourages the submission of bids based on polyethylene piping. Cook concluded, therefore, that the requirement "was impliedly removed through clarification" and should not be used as a basis for rejecting Cook's bid.

After the Army asked our Office to dismiss Cook's protest as an untimely challenge to the IFB specifications, Cook shifted its argument to contend that its protest was timely filed because it submitted its bid reasonably believing the bid to be responsive to the IFB's requirements and it therefore was not required to protest until the Army declared the bid nonresponsive. Cook now asserts that it did not read the IFB as restrictive of competition, but instead understood the IFB to allow bidders to select any of the three available trenchless pipe replacement technologies since the IFB specifications included requirements specific to each technology. Cook argues that bidders were only required to conform to the requirements applicable to their chosen technology. Under this second interpretation, Cook contends that while Valco's Insituform system was required to meet the 225,000 psi flexural modulus requirement, which applies only to ASTM F-1216 resin impregnated tube "cured-in-place" products, Cook's proposed "U-Linear" system does not have to meet the ASTM D-790 flexural modulus requirement because HDPE pipe only has to "meet the requirements of and be used in accordance with ASTM D-3350 [Polyethylene Plastic Pipe and Fittings Material]." Cook contends that this interpretation is reasonable since "no product can simultaneously meet the requirements of ASTM F-1216 and ASTM D-3350." Cook concludes that the specifications are only consistent when read as a whole with the references to polyethylene pipe, considering that only requirements imposed by applicable ASTMs apply to each pipe replacement technology's products, and that under such a reading the flexural modulus/minimum strength requirement of section C-9, paragraph 6.1.5, is "applicable only to ASTM F-1216 products," since that requirement references the ASTM D-790 test standards.

We find both of Cook's IFB interpretations unreasonable. The flexural modulus/minimum strength requirement was clearly stated in the IFB. There is no reasonable indication that this requirement was not applicable to all offered pipe replacement systems. To the contrary, the IFB stated (1) that "[p]erformance and characteristics of any new pipe shall meet minimum requirements listed above" [emphasis supplied] (see section C-9, paragraph 6.2); (2) that "[any PE or HDPE system proposed, must meet all strength and performance requirements" [emphasis supplied] (see section C-9, paragraph 8.2.2); and (3) that in "any conflict between these standards [i.e., ASTM standards] and this specification, this specification shall govern." In addition, as stated above, in its response to Cook's pre-bid

opening letter, which sought the elimination or revision of section C-9, paragraphs 6.1.3 through 6.3 (which includes paragraph 6.1.5's the 225,000 psi flexural modulus requirement) because only Insituform could meet the requirements, the agency made clear to Cook that it regarded the flexural modulus requirement as mandatory to all offered systems. Finally, Cook's positions, as advanced in its protest correspondence, are belied by its May 18 letter, prior to bid opening, which effectively recognizes that the flexural modulus requirement would have the effect of rendering the "U-Liner" system unacceptable, and by the descriptive literature submitted with its bid that used the very standard which Cook's protest asserts is not applicable to its offered pipe system and showed the offered product to have a 136,000 psi rating when tested in accordance with ASTM D-790. Therefore, Cook's bid, which offered a product that admittedly did not meet the flexural modulus requirement, as stated in the IFB, was properly rejected as nonresponsive. See Midwest Pipeliners, Inc., B-250795, Jan. 12, 1993, 93-1 CPD ¶ (bid based on "U-Liner" system was properly rejected as nonresponsive, where the "U-Liner" system was clearly noncompliant with various IFB requirements).

Cook is essentially protesting that the flexural modulus requirement was overly restrictive in that only the Insituform replacement pipe system could meet it. Our Bid Protest Regulations require that protests based upon alleged solicitation improprieties which are apparent prior to bid opening must be filed prior to bid opening. See 4 C.F.R. § 21.2(a)(1) (1992). As evidenced by Cook's May 18 correspondence, Cook recognized this alleged overly restrictive specification prior to bid opening, but chose not to protest it. Therefore, to the extent Cook challenges the IFB specifications, its protest is untimely.

Cook claims, in the alternative, that even if its protest is untimely filed, we should, nevertheless, consider the protest under either the good cause or significant issue exceptions to our timeliness rules. 4 C.F.R. § 21.2(c). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Industrial Acoustics Co., Inc.--Racon, B-246260.2, Jan. 28, 1992, 92-1 CPD ¶ 120. In order to prevent those rules from becoming meaningless, exceptions are strictly construed and rarely used. The only exceptions to the timeliness requirements are where there was good cause for the untimely filing (some compelling reason beyond the protester's control prevented the protester from filing a timely protest) or the protest presents a significant issue (one of widespread interest to the procurement community or one that has not been considered before).

Id. This protest falls under neither exception, since nothing prevented Cook from timely protesting this specification prior to bid opening, nor is this issue concerning pipe system specifications of widespread interest to the procurement community. See Midwest Pipeliners, Inc., supra.

The protest is denied in part and dismissed in part.

  
for James F. Hinchman  
General Counsel